

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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In re: Memorandum Opinion and Order,)	FCC 00-149
Released April 28, 2000)	
)	
Regarding the Applications of)	MM Docket No. 86-440
)	
Achenar Broadcasting Company)	File No. BPCT-860410KP
And)	
Lindsay Television, Inc.)	File No. BPCT-860410KQ
And)	
The Givens & Bell Division of)	File No. BPCT-961023KF
Blue Ridge Video Systems)	
And)	
The Petition of Givens & Bell)	Submitted March 13, 2000
for Rule Making Seeking a New Channel)	
As per Public Notice DA 99-2605)	

For Construction Permit for a new Television Station on Channel 64, Charlottesville, Virginia

To: The Commission:

**REPLY TO ENFORCEMENT BUREAU'S OPPOSITION TO PLEADING,
FILED JUNE 14, 2000.**

1. On June 14, the Commission's Enforcement Bureau (Bureau) replied in opposition to the Opposition, Protest, and Petitions of the Givens & Bell Division of Blue Ridge Video Services (Givens & Bell), filed May 26, 2000. The Bureau's opposition reply is procedurally defective in that it was submitted long after the window to oppose closed on June 5, and also a day after Givens & Bell had submitted its one allowable consolidated reply.¹ If the Commission waives this window, in order to accept and consider the opposition of the Bureau, then Givens & Bell requests leave of the

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¹ See 47CFR1.45(b) and (c).

Commission to submit the following “Petitioners’ Special Reply to the Bureau’s Opposition” in responsive reply to the issues and questions raised².

2. In paragraph 6, the Bureau attempts to claim both that the Achenar and Lindsay applications were still “pending”, and that they are therefore protected from challenge. To defend this claim, the Bureau then refers, in footnote 7, to section 1.65(a) of the Commission’s rules for a definition of “pending” and a discussion of the status of the applicant while before the Courts, to support both claims. This, however, is an out-of-context misinterpretation of section 1.65(a). A full reading of Section 1.65, which solely addresses the requirement of the applicant to keep the Commission up to date on any significant changes in information furnished by the applicant, shows that the definition used therein specifically applies only “For the purposes of this section”, therefore ruling out its use for defending any other purpose. This section, and this definition, binds only the applicant, not the Commission. This definition, as stated in this section, does not afford the applicant protection against challenge. It must be assumed that the Enforcement Division could find no better support in the rules for its claim.
3. With respect to the original applications of Achenar and Lindsay before the Commission, the last applicable appeal, regarding the petition for reconsideration of its final appeal review filed by Lindsay Television on October 21, 1991, was denied on February 26, 1992. At some point after the release date, March 5, 1992, the applications of Achenar and Lindsay were removed from pending status; the Commission verified this when it de-listed the DTV transition assignment for Ch. 64

² 47CFR1.726(b) states: Failure to reply to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically

at Charlottesville/³. This de-listing was a step it could not take without making a determination, at a date long after the District Court decision had been made, that the application of Lindsay (which prior to October 24, 1991, had been granted a construction permit) was not considered to have a protected status at some point prior to the granting of the initial DTV licenses, nor would any future re-instatement be retroactive to its prior grant of construction permit. The Commission's own CDBC database when accessed via Internet, as late as March 15, 2000, under Station Search Details for the Lindsay and Achenar applications, reported the Status: as "Unknown Status"; the applications search reported the Status: as: "Designated for Hearing". The decision of the District Court merely "remand(ed) both license applications to the Commission for an adequate inquiry and explanation of what test of the public interest it is using in the case of astronomy channel use." This did not, in and of itself, reinstate protection against challenge for the applications of Lindsay and Achenar before the Commission; to do so, and the timing of same, is an act only the Commission is authorized to perform, and was only one option the Commission had as a result of the Court decision. The Commission's options included further development of its policy regarding protection of the NRAO. Givens and Bell also provided an alternative option, in its application for construction permit, of showing that accommodation of both the public interest and the interests of the NRAO could be achieved by the proper solution, a solution based upon both technology and precedent, and a solution which neither Achenar nor Lindsay had previously

contradicted in the complaint.

³ In the Sixth Report and Order, FCC 97-115, Para. 17, the Commission "determined that initial eligibility should be limited to those broadcasters who, as of the date of issuance of the initial licenses, hold a license to operate a television broadcast station or a permit to construct such a station, or both. In foot note 26, it

proposed. The Commission has granted, by its motion, a modification of construction permit by CBC of D.C. that accords the “highest form of flattery” to the Givens & Bell application; i.e., it poorly attempts to imitate the combination technical and precedent-based solution presented in the pioneering Givens & Bell application.

2. The Enforcement Bureau states, in paragraph 5, that Givens & Bell must show good reason why it was not possible for it to participate in the earlier states of the proceeding. The Enforcement Bureau then partially answers its own question in paragraph 6. In responsive reply to the question raised by the Enforcement Bureau, we more clearly state that Givens & Bell’s application has been in “Submitted for Filing” status since it was officially “Received”, awaiting promised Commission action to consider it’s accompanying Petition to Waive the Freeze Area as it affected Charlottesville. It was the position of Givens & Bell, after submitting it’s application, and subsequently discovering that the District Court has remanded the matter, that it expected the Commission to finally, permanently decline to reconsider the applications of Achenar and Lindsay. Givens & Bell also expected the Commission to utilize, in its defense of its action, the existence of an alternative solution acceptable both to the Commission and the NRAO, as demonstrated and presented in the Givens & Bell application. It is the position of Givens & Bell that due to it’s application being in “received” status, awaiting action on it’s petitions for waiver, that that it did not yet have status in this proceeding to comment until the Commission, by it’s actions in FCC 00-149, prematurely precluded consideration of the Givens and Bell application and it’s Freeze petitions, and ignored the effort, expense, and

continues: “We will give particular consideration for assigning temporary DTV channels to new licensees who applied on or before October 24, 1991,”

expertise expended in developing and preparing the Givens & Bell application. After all, we believe that the solution presented in the Givens & Bell application, as demonstrated by the effect it has had on the CBC of D.C. application and modification, has spoken louder than any other comment we could have made in this proceeding.

3. We would not have prepared the application had we not previously verified with the Commission that the Channel 64 allotment was available for application. Under section 73.3564(a)-(c), as those provisions read in September, 1996, the Commission would not have received and assigned a file number to the application had it not been tendered in an acceptable, timely manner and with reference to an allotment open to application; otherwise, after the initial check it would have been returned to the applicant, as per section 73.3564(a) as it existed in 1996.
4. The fact that an initial check did occur is verified by the fact that the Givens & Bell application was temporarily returned, when required information on the front page of the application was found by Commission staff to be missing⁴. This proved to be an allowable correction, and the application was then re-submitted. Upon a second review, and upon a finding that the corrected application was not patently defective and was acceptable for filing pending approval of the accompanying requests for waiver, the application was stamped "received" and was assigned a file number on October 23, 1996. Under the rules as they existed in 1996, this was considered a timely submission with regards to the final NTSC application submission window;

⁴ 47CFR73.3564 (as of 1996): "Applications found to meet minimum filing requirements but that contain deficiencies in tender and /or acceptance information shall be given an opportunity for corrective amendment pursuant to Sec. 73.3522. Applications found to be substantially complete and in accordance with the Commission's core legal and technical requirements will be accepted for filing. Applications with

certainly, the accompanying check was “cashed” by the Commission before the application window closed. Therefore, Givens & Bell can demonstrate that it met the requirement that it have an application for a full power NTSC television station on file before September 20, 1996; one that was accompanied by a Petition for Waiver of the Freeze area affecting Charlottesville, and a now-moot, routine Petition for Waiver of a very minor short-spacing with a station in Richmond, Virginia. These Petitions for Waiver resulted in the application being stalled in “submitted for filing” status, pending promised consideration of the Freeze waiver. In support of these facts, Appendix B to this reply is a true photocopy of the Certified Mail Receipts and a Domestic Return Receipt, showing that Givens & Bell mailed the application to the Commission first on September 13, 1996; the U.S. Postal Service Domestic Return Receipt shows the application having arrived at the Pittsburgh lockbox on September 16, 1996; and that the second mailing to the Commission of the corrected application occurred on October 21, 1996. Givens & Bell therefore demonstrates to the Enforcement Bureau that it met one of the conditions stated in footnote 9 of the Enforcement Bureau’s Opposition, and, in the process, it was reviewed, was returned for minor correction (instead of being dismissed), was returned and was reviewed a second time, was then stamped “received” and assigned a file number, and is therefore a twice-recognized “valid applicant for channel 64.”

5. With respect to the Bureau’s vague reference to “the reading together of 47CFR 73.3564(a thru c) and 73.3572(f), (1996)”, we have reviewed same, and demonstrate full compliance, in this reply, with 73.3464(a thru c). The last of the original,

uncorrected tender and /or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for corrective amendment.”

modified applications of Achenar and Lindsay were dismissed in 1991; the application of CBC of D.C., and its modification that the Commission acted upon, was submitted during and after 1998, and acted on April 19, 2000, therefore, the “one day” requirement of 73.3572(f), has been met by several years.

6. We would remind the Enforcement Bureau that the Commission has already waived several applicable portions of the rule sections quoted by the Enforcement Bureau, inter alia, in order to take the action it proposes in FCC 00-149. The Commission cannot take action in the behalf of one applicant and fail to offer equal succor to another; to do so would be to act in an arbitrary manner.
7. With respect to the Enforcement Bureau’s claim in paragraph 7 of its reply that “none are supported by the affidavit of a person with personal knowledge of the facts alleged.” we point out that in this unusual, multiple-waiver required action, a modification of a construction permit on motion of the Commission is involved⁵, and therefore, the provisions of 47CFR1.87 apply.⁶ Therefore, it is not required of Givens and Bell to provide final proof in this matter except as requested to do so by the Commission; it was, in the Opposition and Protest, only appropriate to point out fatal errors and other matters for further investigation by the Commission, and to be prepared and able to provide evidence, sworn statements, and technical proof, on request of the Commission, with regards to said allegations⁷. Since this is a modification of construction permit on motion of the Commission, it is the self-imposed responsibility, and within the sole authority, of the Commission to

⁵ Memorandum Opinion and Order, FCC 00-149, paragraph 1.: “On our own motion, pursuant to 47 U.S.C. paragraph 316, we modify CBC’s construction permit...”

investigate the facts, and to make a proper determination as to the acceptability of the technical aspects of the CBC of D.C. application modification. The Commission has always reserved unto itself the right to provide protection against challenge to an applicant as it sees fit; doing so only to establish and provide order to the process of accepting and selecting applications. It is neither customary, nor required, to provide such protection to a failed applicant once the last appeal before the Commission has been turned down. For the Commission to not reserve this right unto itself would go against the charge granted to the Commission by Congress in 1934.⁸

8. We did further volunteer to provide photographic evidence and submit additional facts in these matters, in order to provide additional speedy justification for the remanding and final dismissal of the applications of Achenar and Lindsay. In responsive reply to the question raised, we also hereby submit, as Appendix A, the sworn statement of Sidney E. Shumate, principal owner of Givens & Bell, who is also an engineer, television station founder and builder, and broadcast facility appraiser of long standing recognized by the Commission. We will also attempt to obtain sworn statements from Mr. Brad Eure, who can be contacted at WWWV-FM, 1140 Rose Hill Drive, Charlottesville, Virginia 22903; and, Mr. Mike Lautar, leasing agent for American Tower's Charlottesville tower site, who can be contacted via (mlautar@americantower.com), or by phone at (703) 914-4472. Once obtained, we will request that the Commission allow us to submit them.

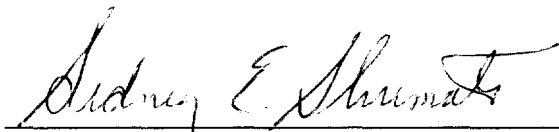
⁶ Sect. 1.87(e) " In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

⁷ See 47CFR1.1 .

CONCLUSION

9. Givens and Bell have responsively replied to the Opposition filed by the Bureau on June 14, 2000. The Bureau's erroneous attempt to show protected status for Achenar and Lindsay utilizing misquoted Commission rules has been rebuffed, and Givens & Bell have also offered proof that they did, in fact, submit for filing a valid application before September 20, 1996.
10. To grant the CBC of D.C. application does not serve the public interest; nor does it serve "the ends of justice" (footnote 8), ends to which Givens & Bell believe the Commission, in its ignorance of the Givens & Bell application, was attempting to achieve in FCC 00-149. The 1991 Commission, in its wisdom, acted to deny the applications of both Achenar and Lindsay after five years of infighting between the two applicants produced no viable solution to the issues raised. The Commission should now defer in this case to the course set by the Commission in 1991 thru 1996; it should use the pioneering solution first proposed in the Givens & Bell application, a solution never proposed by Achenar and Lindsay during the prior 10 years, and the botched attempt of Achenar and Lindsay to reluctantly copy this solution, as evidence to defend and justify its action in its 1991 dismissal decision, and as a basis to dismiss the non-viable CBC of D.C. application and modification.
11. In recognition of its pioneering solution, and to serve the public, the Commission should then allow the Givens & Bell application to immediately proceed.

Respectfully submitted,



Sidney E. Shumate, Principal Owner, Givens & Bell

⁸ "The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Communications Act of 1934, Title I, Section 4(j).

**APPENDIX A
TO THE REPLY TO ENFORCEMENT BUREAU'S OPPOSITION TO
PLEADING**

Sworn statement of :
Sidney E. Shumate
Broadcast Engineer and Appraiser

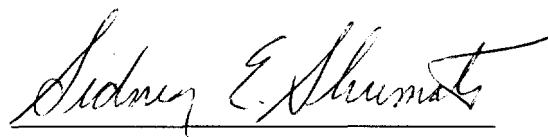
I hereby certify that:

1. On March 3, 2000, I inspected and photographed American Tower site #090228, located on Carter's Mountain, near Charlottesville, Virginia, on which stands a Rohn Model 90 tower structure, identified by posted sign as having FCC antenna structure registration number #1015412. I hereby certify that the two photographs included in the Givens & Bell Opposition and Protest, submitted on May 26, 2000, are true copies of two of a series of photographs I took on that date of the tower and site specified, during an inspection initially intended to support the continued verification of the availability of the site, and tower space identified, in the Givens & Bell application for construction permit BPCT-102396KF.
2. I also certify that I have studied, reviewed, investigated, and re-calculated the engineering mathematics on which the Achenar, Lindsay, and CBC of D.C. applications for construction permit, and subsequent modifications; are based; that the resultant errors found, explanations thereof, and inconsistencies noted in these applications in the Givens & Bell Opposition and Protest, were based upon my work, and are true representations of the results thereof; and that the statements and expert opinion expressed regarding the mounting of the CBC of D.C. antenna, the structural characteristics of this particular, personally familiar brand and model of tower structure, and the comments regarding electrical characteristics and distortion

resultant when a UHF television antenna is placed near a metal support structure, are mine, and are based upon my training, personal investigation, and extensive personal experiences in this field;

3. That I am a graduate electrical engineer with a B.S.E.E. from W. Va. University Institute of Technology (Dec., 1974); that I have over a quarter-century of experience in television engineering construction, maintenance, and operation, primarily as a Director of Engineering of television stations, which included serving as the design engineer and general contractor for the construction or refitting of three full power television transmitter sites in Virginia and West Virginia. These projects included the present main transmitter facility of WVIR-TV, located on Carter's Mountain, which utilizes a Rohn Model 90 tower structure, and a one-kilowatt UHF translator located inside the Quiet Zone at Massanutten Peak, that utilizes a nulling antenna array to protect the NRAO; therefore, I am uniquely qualified to comment on the construction of facilities designed to protect the NRAO Quiet Zone. I hold a lifetime General Class Operator License and a Virginia General Contractor's license, and have been engaged during the past three years as an appraiser, inspector, and evaluator of broadcast and radio properties for a Washington, D.C. financial consulting firm. I also authored and presented a published white paper at the 1998 National Association of Broadcasters engineering conference on building DTV television transmission facilities. My work has long been recognized and accepted before the Commission.

Certified this 19th day of June, 2000 by;


Sidney E. Shumate

APPENDIX B **TO THE REPLY TO ENFORCEMENT BUREAU'S OPPOSITION TO** **PLEADING**

Contents of Appendix: True copies of the Certified Mail Receipts, showing the dates of submission and initial receipt, of the Givens & Bell application.

6-81 P 540 605 785

US Postal Service
Receipt for Certified Mail
 No Insurance Coverage Provided.
 Do not use for International Mail (See reverse)

Sent to
Federal Communications Comm.

Street & Number
PO Box 358165

Post Office, State, & ZIP Code
PITTSBURGH PA 15251-5165

Postage	\$ 3.00
Certified Fee	1.10
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.10
Return Receipt Showing to Whom Date, & Addressee's Address	
TOTAL Postage & Fees	\$ 5.20
Postmark or Date	

PS Form 3800, April 1995

P 606 883 966

US Postal Service
Receipt for Certified Mail
 No Insurance Coverage Provided.
 Do not use for International Mail (See reverse)

Sent to
FCC Mass Media

Street & Number
PO Box 358165

Post Office, State, & ZIP Code
Pittsburgh PA 15251-5165

Postage	\$ 1.00
Certified Fee	1.10
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.10
Return Receipt Showing to Whom Date, & Addressee's Address	
TOTAL Postage & Fees	\$ 6.20
Postmark or Date	

PS Form 3800, April 1995

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

- ☐ Addressee's Address
- ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Federal Communications Commission
Mass Media Services
PO Box 358165
Pittsburgh PA 15251-5165

4a. Article Number
P 540 605 785

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery
SEP 16 1995

5. Signature (Addressee)

6. Signature (Agent)

Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1991 ★U.S. GPO: 1993-352-714

DOMESTIC RETURN RECEIPT

Thank you for using Return Receipt Service.

DOCKET FILE COPY ORIGINAL

June 19, 2000

Ms. Magalie Roman Salas
Secretary, Federal Communications Commission
445 12th St. SW
Washington DC 20554
Re: MM Docket 86-440/Petitioner's Reply

RECEIVED
JUN 21 2000
FCC MAIL ROOM

Dear Ms. Salas:

The Givens & Bell Division of Blue Ridge Video Services submits the enclosed
Petitioner's Special Reply to the Filing of the Enforcement Bureau, Dated June
14, 2000, regarding the proceeding in MM Docket 86-440. We certify that we
are mailing true copies to the following interested parties:

Mr. Gene A. Bechtel, Esq.
Bechtel & Cole Chartered
Suite 260, 1901 L. Street NW
Washington DC 20036

Ms. Katrina Renouf, Esq.
Renouf and Polivy
1432 Sixteenth St., N.W.
Washington DC 20036

James W. Shook, Esq.
Mass Media Bureau
Federal Communications Commission
445 12th St. SW
Washington DC 20554

Christopher J. Reynolds, Esq.
P O Box 2809
Prince Frederick, MD 20678
Counsel for NRAO

Ms. Cara E. Maggioni
Covington & Burling
P O Box 7566
Washington DC 20044-7566
Counsel for Shenandoah Valley Edu. Television

Mr. Brad Eure
Eure Communications,
1140 Rose Hill Drive
Charlottesville VA 22903

Anne Lucey, Esquire
Vice President, Regulatory Affairs
Viacom, Inc.
1501 M. Street, N.W., Suite 1100
Washington, DC 20005



Sidney E. Shumate
Principal Owner, Givens and Bell Division of Blue Ridge Video Services